**Dino and Sons Realty Corporation *and* Najmal Upadye.** Case 2–CA–29306

February 25, 2000

## DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On December 31, 1997, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

## ORDER

The National Labor Relations Board orders that the Respondent, Dino and Sons Realty Corporation, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Margit Reiner, Esq*., for the General Counsel.
*Joseph S. Rosenthal, Esq*. and *Joan Goodwin Zooper, Esq. (Bondy & Schloss, LLP),* for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JESSE KLEIMAN**,** Administrative Law Judge. On the basis of a charge filed by Najmal Upadye, an individual, on April 9, 1996,[1] against Dino and Sons Realty Corporation (the Respondent) a complaint and notice of hearing was issued on November 22, 1996, alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer timely filed the Respondent denied the material allegations in the complaint. By order dated February 28, 1997, the complaint was amended to additionally allege violations of Section 8(a)(1) of the Act against the Respondent. The Respondent also timely filed an answer denying the allegations in the amended complaint.

A hearing was held before me in New York, New York, commencing on March 26 and ending March 28, 1997. Subsequent to the closing of the hearing the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New York corporation with an office and place of business at 220 Fifth Avenue, New York, New York, owns and operates a commercial building located at 220 Fifth Avenue, New York, New York (its facility or building). The Respondent annually, in the course and conduct of its business operations, derives gross revenue in excess of $100,000, of which $25,000 is derived from tenants directly engaged in interstate commerce. I therefore find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The amended complaint alleges, the Respondent admits, and I find that Local 32B-32J, SEIU (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

The amended complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate Najmal Upadye and Will Hardman to their former positions of employment because the employees of the Respondent, Lucy Restrepo, Gary Francis, Richard Finnerty, Luis Acevedo, Cecilia Castano, Maria Serrano, Will Hardman, and Najmal Upadye engaged in concerted activities, and to discourage employees from engaging in these activities, and has thereby been discriminating in regard to hire or tenure or terms or conditions of employment of its employees, discouraging membership in a labor organization. Moreover, the amended complaint alleges that the Respondent violated Section 8(a)(1) of the Act by stating to its employees that they would lose their jobs and not be rehired because they engaged in a strike, thereby interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. The Respondent denies these allegations.

##### *A. The Evidence*

The Respondent and the Union were parties to a collective-bargaining agreement covering cleaners, elevator operators and starters, and security personnel employed by the Respondent at 220 Fifth Avenue, in New York City, which expired on December 31, 1995. Although the Respondent employed more than eight employees at the facility, only Upadye,[2] Gary Francis, Will Hardman, Richard Finnerty, Cecilia Castano, Maria Serrano, Lucy Restrepo, and Luis Acevedo were union members. Hardman, a cleaner and night foreman of the cleaning workers, testified that towards the end of 1995, Rudy Vera, the building superintendent and admittedly a supervisor within the meaning of Section 2(11) of the Act, told Hardman that after 1995 there would be no more union in the building.

Prior to the commencement of negotiations for a successor agreement, the Respondent withdrew its membership from the Real Estate Advisory Board of the city of New York (REAB)

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In light of the finding that the Respondent discharged the striking employees in violation of Sec. 8(a)(3), Member Brame finds it unnecessary to reach the judge's discussion of the status of the employees who replaced the strikers.

[1] By letter dated October 22, 1996, the Regional Director for Region 2 approved Upadye's request to withdraw that portion of the charge alleging a violation of Sec. 8(a)(5) of the Act.

[2] Najmal Upadye is also known as Neal.

the authorized collective-bargaining agent for many of the office and commercial buildings in New York City. On January 4, 1996, the Union called a citywide strike of all office and commercial buildings in New York City where contracts had expired, whether REAB members or those independently owned including the Respondent's facility. Gary Francis, a freight elevator, doorman, and porter, whom Union Business Agent John Kalnberg[3] had appointed as a strike captain, informed the union employees that they should go on strike, which they did, while the Respondent's other employees continued working.[4] Prior to the strike Francis and/or Kalnberg had told the would-be strikers of Francis' position as strike captain, the duties of which were to take attendance at the picket line and distribute news of the strike.

On February 4, 1996,[5] the REAB and the Union reached a settlement regarding a successor collective-bargaining agreement and the Union directed its union membership to return to work the following day. However, the Union continued to strike and picket the buildings owned by nonmembers of the REAB who had not joined in the settlement agreement.

According to the Respondent's witness, Gary Kost, an attorney, licensed real estate broker, and leasing broker for the Respondent's building at 220 Fifth Avenue,[6] during January 1996, several incidents of vandalism occurred in the building such as, fire alarms being periodically set off, electrical switches were being tripped causing power outages in the building and disruption of electrical service, and a bathroom was stopped up causing flooding. These incidents having not occurred prior to the strike, Homero Ferronato, the Respondent's building manager, issued instructions to Kost not to allow the strikers into the building since the Respondent was concerned about such vandalism.

On February 5, the citywide strike being ended, the Respondent's employees returned to work. Francis testified that while reporting for work, he was told by Rudy Vera, the building superintendent,[7] that Ferronato said, "That we couldn't go back to work." He related that Vera had also told this to Serrano and Castano. Maria Serrano who had worked for the Respondent as a cleaner testified that Vera told her and Castano, in Spanish, "that the strike has ended, it didn't end for us because we weren't allowed to go in to work." Francis stated that he then waited for the rest of the strikers (other than Finnerty) to advise them of what had happened. Upadye, a porter/security guard, confirmed that when he arrived at the premises, Francis told him that Homero Ferronato had instructed Vera not to allow the strikers back in the building. Kost testified that it was "entirely possible" that he told the strikers that they were not permitted into the building because of "trouble with vandalism." Moreover, although he could not pinpoint the date, Hardman testified that, after the strike began, Vera again had stated that the Respondent did not want the Union in the building.

Later that day, February 5, Francis, Hardman, Upadye, Castano, Serrano, Restrepo, and Acevedo went to the Union to see Kalnberg and told him that Vera would not allow them to return to work pursuant to Ferronato's instructions. However, Ferronato denied ever telling Vera that the Respondent would not rehire the strikers. Upadye testified that Kalnberg had told them that they were not locked out, that the Union was still negotiating with the Respondent, and suggested that the workers "go on striking" and to picket which they did.[8] Kalnberg testified that after Francis told him that these employees had been told by the superintendent that they were no longer needed at the building anymore, he telephoned Ferronato and asked him why the strikers were not being allowed to return to work. According to Kalnberg, Ferronato responded that the Respondent did not want these employees back to work "because their wages and benefits were too high." Ferronato denied ever receiving such a telephone call from Kalnberg.

Upadye testified that during the week of February 5 he had asked Rocco Tomassetti, the Respondent's vice president, for his job back but was told that, "no strikers are allowed in the building, no strikers are going to be hired back, something like that." Upadye related that sometime that same week or the next he again asked Tomassetti why he wasn't being hired back and Tomassetti replied that the Respondent wasn't hiring back any strikers. He stated that he believed that Greg Kost was present at one of these conversations. Upadye mentioned these conversations to his fellow strikers. However, Tomassetti denied having any such conversations with Upadye. According to Tomassetti sometime at the beginning of February during his visit to the Respondent's facility, Upadye had asked if he could stay in the building because it was cold that day and Tomassetti told him no.

On March 13, Ferronato, Joseph S. Rosenthal, the Respondent's counsel, and Jacqueline Meyer, met with Kalnberg and Ira Strum, the Union's counsel for the purpose of negotiating a new collective-bargaining agreement. Ferronato testified that the Union wanted the Respondent to sign the same agreement as the REAB one in order to end the strike. The Respondent offered its counterproposal, which was rejected by the Union. According to Ferronato, the Respondent advised the Union at this meeting that it had replaced the striking employees with permanent replacements but should the striking employees wish to return to work, the Respondent would employ them if there were positions available.[9] On the basis of an alleged impasse having been reached, no further meetings were scheduled between the parties. While Kalnberg recalled that such a meeting

[3] Kalnberg's name is incorrectly spelled "Kalamberg" in the transcript.

[4] Richard Finnerty was ill and did not join the strike for the first 3 weeks.

[5] Unless otherwise stated, all events occurred during 1996.

[6] Kost is not an employee of the Respondent but earns commission on the leases he brokers and attorney's fees for work performed in this connection.

[7] Vera was not called as a witness.

[8] However, Kalnberg testified that he had not told the employees that it was not a lockout although he corroborated the rest of Upadye's testimony regarding this meeting. The strikers continued to picket until mid-April or May although Upadye stopped sometime earlier. Kalnberg testified that he told the Respondent's employees to continue the strike because the Respondent refused to sign a contract and that in July or August he finally told them that it was up to them whether or not if they wanted to continue the strike. The strikers carried picket signs which stated, "32B–32J strike, Please support us."

[9] This testimony was elicited by the following questions:

Q. Was there any discussion about who the company was employing at that particular time in March?

A. What's that?

Q. Was there any discussion about the fact that the company was employing permanent replacements during March of 1996?

A. Yes, we told them we were having permanent positions there filled.

took place, he could not recall what was said, and the Union's attorney, Sturm, was not called as a witness to testify.

Sometime in March or April Upadye stopped picketing and returned his keys to Kost and telling him that although he had asked Rocco Tomassetti for his job back, Rocco refused to do so. Moreover, Kost said that the Respondent would not rehire the strikers. Upadye stated that, "After this, he never asked for his job back because he felt, 'there was no point.'" Kost denied having told Upadye that the Respondent would not hire back the strikers.

Hardman testified that, on July 11, on the advice of a Board employee, he called Dino Tomassetti, the Respondent's president and owner, and asked for his job back. Tomassetti replied that Hardman lost his job because he went out on strike and he refused to reinstate him. Hardman stated that he did not ask for work prior to July 11 because Vera had told him that the Respondent no longer wanted the union people in the building. Hardman related that he had told the unemployment office that he had been locked out. Serrano also testified that she never asked for her job back because Vera had said that the striking employees could not return to work. Tomassetti denied that he had received any such phone call from Hardman.[10]

Francis testified that sometime in August, on the suggestion of a Board employee, he called Ferronato to ask whether he could return to work. Ferronato told Francis that he would call him if anything came up. Francis related that he had not called sooner because he considered such a request for reemployment as hopeless in view of what Vera had told him previously that Ferronato's instructions were not to allow the strikers back to work. The evidence here confirms that none of the strikers have been rehired. Additionally, the testimony of Francis, Upadye, Serrano, Hardman, and Kalnberg indicated that they were never told that the new workers present in the building were hired as permanent employees.

Finnerty testified that he did not ask for his job back after February 5 because he believed that it would be "futile to ask because they had hired people." Finnerty added that he had never heard Dino or Rocco Tomassetti, Vera or any other of the Respondent's management employees say that he was not to be rehired or that the Respondent would not hire back the striking employees.

The remaining three strikers, Restrepo, Acevedo, and Castano, did not testify here. Moreover, the evidence shows that from January 4 until at least the end of May 1996, the strike and picketing of the Respondent's facility by the eight union employees, Upadye, Francis, Hardman, Serrano, Acevedo, Castano, Restrepo, and Finnerty, continued unabated.

Ferronato testified that the Respondent permanently replaced all eight strikers during the strike. He stated that certain employees who were not on strike were promoted or transferred to fill the positions left vacant by the strikers, and some positions were filled by new hires Ferronato related that each of the replacements had been told that they had been hired as permanent employees with a short 2-week probationary period to determine if they could do the job and each accepted employment on that basis. The Respondent's payroll records in evidence reflect only hours of work for each employee, but do not indicate change in job title, promotions, transfers, work schedules, or the like.

Ferronato testified that Upadye, a porter/security guard working the 4 p.m. to midnight shift, was replaced by Raymond Andujar, who was transferred from his previous position as a part-time weekend security guard on January 16, 1996. Ferronato stated that when he changed Andujar's position he "told him that it would be a permanent position." However, the Respondent's payroll records did not reflect a promotion for Andujar, nor salary increase except that it entailed more hours of work and thus more money, and Andujar was still employed by the Respondent in this position at the time of the hearing.

Ferronato testified that Finnerty, the elevator starter, was replaced on January 16, 1996, with a new employee, Marcio Caba, who was still employed in that position at the time of the hearing. Ferronato stated that he told Caba that the position to replace Finnerty was permanent. Ferronato also testified that Francis, the porter/freight elevator operator, was replaced by William Munoz who was promoted to Francis' position on January 4, 1996, and who was still employed by the Respondent at the time of the hearing. Ferronato said that he told Munoz at the time of the promotion that it was permanent since the strike was continuing.

Ferronato related that he replaced Hardman, the cleaning crew foreman, with Luz Elena Verges who was transferred to that position the week of January 10, 1996. He stated that he told Verges at the time of the promotion to be in charge of the cleaning crew, that it was permanent. Verges was still employed in this position at the time of the hearing. Ferronato testified that the four striking cleaners, Acevedo, Restrepo, Castano, and Serrano, were all replaced by four permanent cleaners. The replacements for these employees were: Oscar Orosco hired during the week of January 9, 1996, and still employed at the time of the hearing; Maria Arias hired the week ending February 6, 1996, and she worked as a cleaner until September 17, 1996; Marleny Bartolo hired the week ending February 20, 1996, and she worked as a cleaner until September 17, 1996; Eucarix Martinez hired during the week ending February 20, 1996, and she worked as part of the cleaning crew until May 28, 1996. Ferronato stated that he told these employees when they were hired that, "there was a strike and we need people to work and they have a permanent job if they are good." Ferronato added that the three employees who left prior to the time of the hearing were replaced by permanent employees who are still working for the Respondent.

Ferronato testified that none of the eight striking employees had contacted him to offer to unconditionally return to work. Nor had anyone from the Union communicated with Ferronato that the employees would unconditionally return to work. Moreover, Ferronato denied that he told Vera that the Respondent "would not return any of the striking employees even if they were to make an unconditional offer to return to work." According to Ferronato, the Respondent's policy towards the striking employees was, "If they want to return to work if there is any position available they should return with the rates that we are paying the other people that we hire which is much less than the Union were paying."

### Credibility

As to the credibility of the respective parties' witnesses here, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and

[10] The Respondent alleges that aside from the fact that Hardman had been permanently replaced by another employee, Hardman had already decided to retire and thus any employment he sought would be temporary. The Respondent also asserts that Hardman was a supervisor under Sec. 2(11) of the Act and therefore "not protected by Section 8(a)(3)."

admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises,* 259 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills,* 223 NLRB 230 (1976). From the above, I tend to credit the account of what occurred as given by the General Counsel's witnesses. Although I did note some inconsistencies in the record, their testimony was generally given in a forthwright and believable manner, was consistent and corroborative of each others and with the other evidence in the record, and discrepancies in their testimony was sought to be explained in an apparent truthful and reasonable manner. In contrast, the testimony of the Respondent's witnesses was evasive, guarded, and inconsistent at times and in contradiction of other evidence in the record, and interestingly, in some respects supportive of the testimony given by the General Counsel's witnesses in this case. Moreover, I especially found the testimony and demeanor of Homero Ferronato to be less than credible. Of additional significance is the failure of the Respondent to call Rudolfo Vera as a witness without explanation to corroborate, clarify, or rebut any of the testimony given. From the record evidence, it would appear that his testimony would be of some importance, and since not elicited, it is presumed that it would not support the contentions of the Respondent.[11]

*B. Analysis and Conclusions*

On January 4, 1996, eight of the Respondent's employees, Upadye, Francis, Hardman, Serrano, Acevedo, Castano, Restrepo, and Finnerty engaged in a strike and commenced picketing in support of the Union's demand for a successor collective-bargaining agreement. An economic strike is protected activity and strikers retain the status of employees. Although an employer may permanently replace strikers with others in an effort to carry on its business, any discrimination in putting the strikers back to work is a violation of Section 8 of the Act. *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 346–347 (1938).

The respective rights of economic strikers and thus employees are well established. As articulated in *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389 (D.C. Cir. 1995):

> An economic striker who offers unconditionally to return to work is entitled to immediate reinstatement unless his employer can show a "legitimate and substantial business justification [. . . ]" for refusing to reinstate him. *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 378 (1967). That he was replaced by a permanent employee during the strike is such a justification, id. at 379; an economic striker who is permanently replaced thus loses his right to immediate reinstatement. *NLRB v. International Van Lines,* 409 U.S. 48, 50 (1972); *General Industrial Employees Union Local 42 v. NLRB,* 951 F.2d 1308 (D.C. Cir. 1991).

As the Supreme Court stated in *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375 (1967):

> Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justification," he is guilty of an unfair labor practice, *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. Ibid. It is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." [Id. at 33–34 ]. . . .
>
> In some situations, "legitimate and substantial business justifications" for refusing to reinstate striking employees who engaged in an economic strike, have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345–346 (1938) . . . . But in *NLRB v. Great Dane Trailers*, supra . . . we held that proof of anti-union motivation is unnecessary when the employer does not meet his burden of establishing "that it was motivated by legitimate objectives." [Id. 388 U.S. at 34 ]

An economic striker then is required to make an unconditional offer to return to work in order to preserve the right to immediate reinstatement on the conclusion of, or the strikers abandonment of, the strike. *Gibbons Greetings,* supra. However, in *Abilities & Goodwill, Inc*., 241 NLRB 27 (1979), the Board held that an unlawfully discharged striker much like a discriminatorily discharged employee is not required to first make an unconditional offer to return to work in order to preserve the right to immediate reinstatement.

The Board stated therein:

> Indeed, such a request, in all likelihood, would fall upon deaf ears when one considers that the employer had just fired the employee. In this connection, the Board has frequently said that it will not require a person to perform a futile act . . . suggests the inequity of requiring discharged strikers to request reinstatement, for the fact of discharge itself clearly impresses upon the employees that their services are no longer desired and that a request to return would be a useless gesture.

Also see *Cargill Poultry Co.,* 292 NLRB 738 (1989)[12]

[11] An adverse inference may properly be drawn regarding any matter about which a witness is likely to have knowledge, if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party. Contrast: *Goldsmith Motors Corp.*, 310 NLRB 1279 fn. 1 (1993*); Property Resources Corp*. 285 NLRB 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988).

Also, from the failure of a party to produce material witnesses or relevant evidence without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. *7-Eleven Food Store,* 257 NLRB 108 (1981)*; Publishers Printing Co.,* 233 NLRB 1070 (1977); *Martin Luther King Sr. Nursing Center,* 231 NLRB 15 (1977).

I am aware that three of the discriminatees also were not called as witnesses by the General Counsel. Be that as it may, even if an adverse inference were to be drawn from this it would in no way have the same evidentiary effect on determining the issues in this case as the failure of Vera to testify here, perhaps other than a consideration of its effect on a remedy if the commission of unfair labor practices were to be found here. Their testimony, under the facts of this case, might almost be argued as cumulative with respect to proving the issues involved, and the same can certainly not be said about Vera's failure to testify in this matter.

[12] In *Martiki Coal Corp.*, 315 NLRB 476 fn. 1 (1994), cited by the General Counsel in her brief, the Board distinguished that case from *Carrel Poultry Co.,* supra, and *Abilities & Goodwill, Inc.*, supra, stating, "Those cases, unlike the one before us, involve an employer's unlawful termination of strikers who, as a consequence of their unlawful termination, did not tender an unconditional offer to return to work." In *Martiki Coal Corp.*, the employer had unlawfully failed to

The record evidence shows that on February 5, when striking employees, Francis, Serrano, and Castano attempted to return to work the Respondent's building superintendent, Rudy Vera, told them that Building Manager Homero Ferronato had instructed him not to allow them to do so. Francis, the Union's "strike captain," informed the other striking employees, Upadye, Hardman, Restrepo, and Avecedo what Vera had told them about not allowing the strikers back to work in the building. Later that day these six employees went to the Union and advised Union Representative Kalnberg what Vera had said. At Kalnberg's office striking employee Finnerty was also apprised of this. According to Kalnberg's credited testimony, he then telephoned Ferronato and asked him why the striking employees were being refused their jobs back and was told that the Respondent did not want these employees back because "their wages and benefits were too high."[13]

Moreover, both Rocco and Dino Tomassetti told Upadye and Hardman, respectively, that they had lost their jobs because they went on strike. Additionally, Vera told Hardman on at least two occasions that after 1995, there would no longer be any union in the building. Upadye, Hardman, Francis, and Serrano all testified that they believed that it was useless to ask for their jobs back, because they had unequivocally been told that the Respondent would not allow them to return to work because they had gone out on strike in support of the Union.

While the only requisite to the striking employees right to reinstatement is an indication that they wished to return to work and have abandoned the concerted withholding of their services, under the circumstances present in this case an unconditional offer to return to work by these employees, after their unsuccessful attempts to do so and/or their awareness of the Respondent's actions in precluding their return to their jobs would have been futile, and therefore not a prerequisite to their right to reinstatement. *Fun Striders, Inc*., 255 NLRB 1351 (1981).

An employer has the right to replace economic strikers with permanent replacements during a strike. *NLRB v. Fleetwood Trailer Co*., supra; *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (9th Cir. 1968), cert. denied 397 U.S. 920 (1969). Whether an employer has permanently replaced a striker is a factual issue. To meet its burden of proving that the replacements were hired as permanent employees the employer is required to show that it had a "mutual understanding" with the replacements that they were permanent. *Hansen Bros. Enterprises*, 279 NLRB 791 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987); see *Associated Grocers*, 253 NLRB 31 (1980), enfd. 672 F.2d 897 (D.C. Cir. 1981).

The Respondent asserts that it has "demonstrated by substantial and unrebutted evidence that the replacements for the striking employees (1) were hired during the strike; (2) were told that they were permanent employees; (3) understood at the time they took the position that the jobs were permanent. The undisputed testimony of. Ferronato established such mutual understanding." I do not agree.

First, it must be remembered that I did not find Ferronato a credible witness and his testimony appears crucial to the Respondent's establishing that the striking employees were permanently, replaced. Second, as in *Augusta Bakery Corp.*, 957 F.2d 1467 (7th Cir. 1992), the employer in that case had hired 16 replacement workers who were told that "if they worked out and did their job, they had a job." However, as the administrative law judge in the underlying case observed in finding that *Augusta* had failed to establish the permanency of the replacements, was that Augusta had called none of the 16 hires to testify as to what their understanding of the hiring arrangement was, the length of the hire or how long they could work, future availability for work, etc. The same is true in the instant case. Third, the documentary evidence here does not support the Respondent's assertions.

The law is clear that an employer need not immediately reinstate an economic striker who has been permanently replaced, although once an economic striker makes an unconditional offer to return to work, that worker must be placed on a rehire list so he or she can be offered a job if and when a vacancy arises. *Teledyne Still-Man*, 298 NLRB 982 (1990), enfd. 938 F.2d 627 (6th Cir. 1991); *Martiki*, supra. The General Counsel alleges that the strikers were not permanently replaced. The record evidence supports the General Counsel's contention.

Ferronato testified that, on January 4, Upadye was replaced by Raymond Andujar, a security guard who previously worked weekends. He stated that although Andujar's salary was not increased, he earned more money because, after the strike began, he worked 5 days per week instead of 2 days per week. The payroll records produced by the Respondent, however, show that, during the latter half of 1995 as well as during 1996, Andujar generally worked a 40-hour week and earned $440 per week. Thus, Ferronato's testimony regarding Andujar's promotion appears untrue. With regard to Andujar's schedule, Ferronato tried to obfuscate the truth. He testified that he had employees work overtime to replace Upadye's and Audujar's former weekend shifts.[14] Any increase in Andujar's hours caused by a change from a weekend to a weekday shift is no different than the increase in the hours of the other employees. Such an increase in hours does not constitute being a permanent replacement.[15] Ferronato stated that the Respondent replaced Francis by promoting William Munoz on January 4. The payroll records, however, show that Munoz earned $10/hour both prior and subsequent to January 4 once again showing Ferronato's testimony regarding promotion to be untrue.

Ferronato testified that, during the week ending January 16, 1996, the Respondent hired a new employee, Marcio Caba, to replace Finnerty. On cross-examination, however, when confronted with the payroll, he admitted that Diane Joseph was hired on January 10 to work at the desk, the job Finnerty used to do. The documentary evidence further shows that Joseph worked until the week ending February 27. When asked whether Joseph replaced Finnerty, Ferronato stated that she helped Caba replace Finnerty. Ferronato's testimony is obviously untrue as Joseph was hired prior to Caba. Thus, the evi-

reinstate striking employees who had unconditionally offered to return to work.

[13] This would be consistent with Ferronato's own testimony that he told the Union that the strikers would be returned to work when openings occurred but at the lower salaries paid to new employees.

[14] Upadye had worked 7 days per week for the Respondent.

[15] See *H & F Birch Co.,* 188 NLRB 720, 723 (1971), modified and enfd. 456 F.2d 357 (2d Cir. 1972), wherein strikers were replaced by employees who transferred from other departments. As the transferred employees were not replaced, the Board held that the strikers were not permanently replaced. In modifying the Board's Order, the circuit noted that the transferred employees wanted the transfer and did not transfer simply to accommodate the employer. It appears that in the instant case, Andujar simply transferred his shift to accommodate the Respondent.

dence shows that, on February 27, when Joseph left, Finnerty's position opened up and has remained open.

Ferranto testified that he replaced Hardman by promoting Luz Elena Verges on January 4. Payroll records show that Verges was not even initially hired by the Respondent until during the week ending January 30, 1996,[16] and that she did not work between February and May. Thus, the documentary evidence shows that Verges was not promoted and that her employment was erratic rather than permanent.

With regard to the four striking members of the cleaning crew (Restrepo, Acevedo, Castano, and Serrano) Ferronato testified that he hired four new cleaners to replace them. During the week ending January 9, he hired Oscar Rocco, during the week ending February 6, he hired Maria Arias, and during the week ending February 20, he hired Marleny Bartolo and Eucarix Martinez. Martinez stopped working for the Respondent during the week ending May 28 and Arias and Bartolo stopped working for the Respondent during the week ending September 17. All three have been replaced. Ferronato's testimony clearly shows that two of the four striking cleaners were not replaced at the time of their February 5 discharge.

Ferronato's testimony with regard to the replacements of the replacements shows that many of the initial replacements are no longer working for the Respondent and that, rather than rehiring the strikers, the Respondent hired new replacements. Ferronato testified that to replace Martinez, he hired Maria Andino who began to work during the week ending June 4. To replace Bartolo, he hired Luz Estella Aponte. When shown the 1995 payroll, however, Ferronato admitted that Aponte was hired in the middle of 1995, Ferronato could not adequately explain this discrepancy. He did alter his testimony, however, to state that Bartolo was not hired on a permanent basis although earlier he stated that everyone was hired permanently. On cross-examination, Ferronato testified that Bartolo was hired to help Aponte. Ferronato also testified that Moreno replaced Arias. When shown the 1996 payroll, Ferronato admitted that Arias stopped working on September 17 and Moreno began before her on February 9. On redirect examination, Ferronato stated that it was Maria Andino, who began working the week ending June 4, who replaced Arias. Finally, Ferronato stated that he was unsure as to who replaced whom.

Thus, the evidence shows that one cleaning position was never replaced and that the initial replacements of two others left the Respondent's employ with no one replacing them. The one position that was never replaced involves Bartolo. Although Ferronato initially testified that Bartolo was a replacement, he subsequently testified that she was not, and that she just helped Aponte. Aponte, however, was hired in 1995 and, therefore, cannot have been hired as a replacement for one of the striking cleaners. *Georgia Highway Express,* 165 NLRB 514, 516 (1967), enfd. 403 F.2d 921 (D.C. Cir. 1968), cert. denied 393 U.S. 935 (1968).

The two replacement cleaners who have not been replaced are Arias and Martinez. Payroll records show that Martinez left the Respondent's employ during the week ending May 28. Although Ferronato initially stated that Martinez was replaced by Andino, he later changed his testimony to state that Arias was replaced by Andino. This means that no one replaced Martinez when he left. Payroll records show that Arias left the Respondent's employ during the week ending September 17. Although Ferronato originally testified that Moreno replaced Arias, he later changed his testimony to state that Andino replaced Arias. Either response still means that Arias was never replaced as Moreno, who started work on February 9, and Andino, who started work on June 4, both started before Arias and, therefore, could not have replaced her.[17]

As set forth above, the law is well settled that the Respondent has the burden of proving that the strikers were permanently replaced. *NLRB v. Murray Products*, 584 F.2d 934, 939 (9th Cir. 1978). In determining whether an employer has sustained its burden of showing that the striker replacements were permanent, the Board and the courts look to whether the replacements were hired in a manner that would show that the replacements were regarded by themselves and the employer as having received their jobs on a permanent basis. *Sunol Valley Golf Club*, 310 NLRB 357 (1993) enfd. sub nom. *Invaldi v. NLRB*, 48 F.3d 444 (9th Cir. 1995); *Chicago Tribune Co*., 318 NLRB 920 (1995); *Georgia Highway Express*, 165 NLRB 514, 516 (1967), affd. sub nom. *Teamsters Local 728 v. NLRB*, 403 F.2d 921 (D.C. Cir. 1968), quoted in *Belknap v. Hale*, 463 U.S. 491, 501 (1983); *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987) ("in order to show replacements have been permanently employed, the employer must show a mutual understanding between itself and the replacements that they are permanent"). See also *NLRB v. Murray Products*, supra.

In the instant case, as in *Sunol Valley Golf Club,* supra, there is no evidence to show that replacements were informed that they were permanent.[18] Although Ferronato, who hires employees for positions at the Respondent's facility, originally testified that beginning January 5, he began promoting workers who were not on strike or hiring new workers and told the workers he hired or promoted that their new positions were permanent, he admitted subsequently that what he actually told them, as he always did with all employees, was that they would be permanent if they performed well. Further, although the replacements were told they were being hired because of the strike, like the replacements in *Sunol Valley,* they were not informed what their status would be if strikers offered to return to work and there is no evidence that they were told what would happen after their probationary period, which Ferronato,

[16] Although the date of hire is listed as January 19, Ferronato stated that those dates were often incorrect and it was necessary to look at the first time an employee was paid to determine the week in which the employee was hired.

[17] There was testimony regarding three cleaners, Arles de la Pava; Emenegildo Sosa, and Ana Torres who were hired January 9 and 15 and February 12, respectively. Ferronato testified that these three individuals were extra cleaners (Pava and Sosa stopped working during the week ending February 13 and Torres stopped working during the week ending May 14) and never replaced anyone. Thus, their employment is irrelevant with regard to the issue of replacements. Moreover, the fact that replacement employees are still working for the Respondent does not, as the Respondent contends, mean they are permanent, it only means that the Respondent has not rehired the discriminatees.

[18] In addition, the strikers and Kalnberg all testified that they were never told that the replacements were permanent. The Respondent asserts that "it is irrelevant whether the striking employees understood that their replacements were permanent." Whether "the striking employees were not told that the replacement were permanent . . . even if true (and it is not) is not relevant to the determination of the issue before the Board." I do not agree. Certainly, this fact might have a bearing on whether it was futile for the strikers to make an unconditional request for their jobs back.

seemed unable to determine stating it was "maybe two weeks." *Sunol Valley* supra at 375. Finally, as no replacement workers testified, the Respondent has not shown, as it must in order to meet its burden, that there was a mutual understanding between the replacements and the employer as to their status. *Hansen Bros. Enterprises,* supra; *J. M. Sahlein Music Co.,* 299 NLRB 842, 848 (1990). Thus, I find that the Respondent has failed to meet its burden of showing that the striking employees were permanently replaced.

The Respondent put forth no legitimate basis for the discharge and failure to rehire the strikers and it is clear that these actions were undertaken solely because the strikers were members of the Union and had engaged in a strike. Both Rocco and Dino Tomassetti told Upadye and Hardman, respectively, that they had lost their jobs because they went on strike and Vera told Hardman on several occasions that, after 1995, there would be no more Union in the building. Moreover, Vera told the strikers that Ferronato had instructed him not to allow the striking employees to return to work.

In sum, the evidence demonstrates that the Respondent's failure to rehire the strikers violated Section 8(a)(1) and (3) of the Act. *NLRB v. Mackay Radio & Telegraph Co*., supra; *Abilities & Goodwill, Inc.*, supra.

Additionally, the record evidence shows that Upadye and Hardman each made unconditional offers to return to work but the Respondent refused to reemploy them.

On a striker's unconditional offer to return to work, unless that employee has been permanently replaced, the employer is obligated to reinstate that employee and failure to do so, even in the absence of antiunion motivation, is an unfair labor practice, *Laidlaw Corp*., 171 NLRB 1366, 1369 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

On two occasions in February, Upadye asked Rocco Tomassetti for his job back and was told that the Respondent was not hiring back the strikers. Again in March or April, Upadye asked Kost why he wasn't being rehired and was told that the strikers would not be rehired. Additionally, at the suggestion of a Board agent on July 11, Hardman called Dino Tomassetti and asked for his job back and was told that he lost his job because he went out on strike. Since Upadye and Hardman made unconditional requests for reinstatement, even assuming that they were not discharged on February 5, the Respondent violated the Act by failing to rehire them. As found above, their jobs had not been filled by permanent replacements and also their offers of reinstatement had not lapsed.

The law is clear that once strikers have made unconditional offers to return to work, there is no time limit on their reinstatement rights. Economic strikers who apply for reinstatement while these positions are filled by permanent replacements "(1) remain employees; and (2) are entitled to full reinstatement upon the departure of the replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." *Laidlaw,* supra at 1369–1370, see also *Teledyne Still-Man,* 298 NLRB 982, 984 (1990).

The Respondent offered no business justification for failing to offer full reinstatement to Upadye and Hardman and the Respondent's attempt to show that Upadye obtained substantially equivalent employment was unsuccessful as was its effort to show that Hardman's request should not be considered because he intended to retire.

It is the Respondent's burden to show that employees have obtained substantially equivalent employment so as to relieve itself of any obligation to reinstate the employees. This can be done by examining the employees' current wages, benefits, and working conditions. *Rose Printing Co*., 304 NLRB 1077 fn. 3 (1991). The Respondent failed to meet its burden in this regard. Moreover, even if the employees had found jobs which were substantially equivalent, that would not per se establish that the employees abandoned interest in obtaining back their prestrike jobs. *Rose Printing Co*., supra.

Upadye worked 7 days/week, 8 hours/day as a porter/security guard and earned something over $14/hour. In November, he obtained a temporary position with a stock brokerage company earning $670/month gross. Prior to that, he held various jobs and at no time since he worked for the Respondent has Upadye earned as much money as he did while working for the Respondent. Thus, no evidence was adduced to show that he obtained substantially equivalent employment.

With regard to Hardman, the Respondent attempted to show that Hardman's original offer was conditional because he intended to retire as evidenced by his putting in his retirement papers in July. The Respondent also contended that Hardman abandoned interest in his job when he began to draw retirement benefits in December. Hardman testified that he put in his retirement papers in July and asked the Union to put them on hold. In December, as he intended, he officially retired. At this time, he began to draw retirement pay, retroactive to July. Hardman's declaration of retirement confirms his testimony in this regard.

Once an employee makes an unconditional offer to return to work, he or she is not obligated to make further ones. *Martiki Coal Corp.,* supra at 476–477 fn. 1. Anything that happens subsequent to a striker's offer to return to work is not relevant. *Capital Steel & Iron Co.,* 317 NLRB 809, 814 (1995), enfd. 89 F.3d 692 (10th Cir. 1996). In *Sahlein,* supra, the Board affirmed the judge's finding that it is irrelevant whether or not there were modifications made to an original unconditional demand to return to work, as the later demands were made in response to the Respondent's failure to reinstate the two strikers. Similarly, in the instant case, the fact that Hardman put in his retirement papers after the Respondent refused to return him to work, or that his retirement was eventually retroactive to July, does not negate his original unconditional offer to return to work. In fact, Hardman testified that the reason he originally told the Union to hold his retirement papers was that in case he returned to work, he would just throw them out the window. Even if the Respondent doubted that Hardman's offer was unconditional, it is the employer's burden to establish that the offer was conditional. If an employer considers an offer to return to be ambiguous, it must ask for a clarification to resolve the ambiguity, rather than ignore the offer. *La Corte ECM, Inc.,* 322 NLRB 137 (1996).

Moreover, the Respondent's contention that Upadye and Hardman did not make timely offers to return to work has no basis in law. In *Teledyne Still-Man,* supra, the Board, citing *Brooks Research & Mfg*., 202 NLRB 634 (1973), held that "there is no time limit on the reinstatement rights of economic strikers, once unconditional offers to return to work have been made, since the employer's burden in contacting strikers who

have continued to make known their availability for employment 'is neither onerous nor severe' 202 NLRB at 636."

The Respondent also maintained that Hardman was a supervisor within the meaning of Section 2(11) of the Act, and therefore "not protected by Section 8(a)(3)."

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, responsibility to direct them; or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).

The status of supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.,* 175 NLRB 142 (1969); *Longshoremen ILA v. Davis,* 476 U.S. 380, 396 fn. 13 (1986). It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. *Advanced Mining Group,* 260 NLRB 486 (1982); *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982). To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer statutory status *Cypress Lawn Cemetery Assn.,* 300 NLRB 609 (1990); *Superior Bakery*, 294 NLRB 256 (1989), enfd. 893 F.2d 493 (2d Cir. 1990); *NLRB v. Bergen Transfer & Storage Co.,* 678 F.2d 679 (7th Cir. 1982).

However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *HS Lordships,* 274 NLRB 1167 (1985); *NLRB v. Wilson-Crissman Cadillac, Inc.,* 659 F.2d 728 (6th Cir. 1981). Indeed, as the court stated in *Beverly Enterprises v. NLRB,* 661 F.2d 1095 (6th Cir. 1981), "Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor." Thus the exercise of some supervisory authority "in a merely routine, clerical, perfunctory or sporadic manner does not elevate an employee into the supervisory ranks," the test must be the significance of his judgment and directions. *NLRB v. Wilson-Crissman Cadillac, Inc.*, supra; *Hydro Conduit Corp.,* 254 NLRB 433 (1991). Consequently an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *NLRB v. Wilson-Crissman Cadillac, Inc*., supra.

Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Federal Compress Warehouse Co. v. NLRB,* 398 F.2d 631 (6th Cir. 1968). Additionally, the existence of independent judgment alone will not suffice for, "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." *Advance Mining Group,* 260 NLRB 486 (1982); *NLRB v. Brown & Sharpe Mfg. Co.,* 169 F.2d 331 (1st Cir. 1958). In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former. *Advance Mining Group,* supra, and *NLRB v. Security Guard Service, Inc*., 384 F.2d 1 (5th Cir. 1967). Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a "supervisor" within the meaning of the Act, rests on the party alleging that such status exists. *RAHCO, Inc.,* 255 NLRB 235 (1983); *Tucson Gas & Electric Co.,* 241 NLRB 181 (1979). However, in *NLRB v. Health Care & Retirement Corp. of America,* 987 F.2d 1256 (6th Cir. 1991), the Sixth Circuit held that the General Counsel has the burden of establishing supervisory status. Where the possession of any one of the aforementioned powers is not conclusively established, or "in borderline cases" the Board looks to well-established secondary indicia, including the individual's job title or designation as a supervisor, attendance at supervisorial meetings, job responsibility, authority to grant time off, etc., whether the individual possesses a status separate and apart from that of rank-and-file employees. *NLRB v. Chicago Metallic Corp.,* 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan,* 237 NLRB 844 (1978); and *Flex-Van Corp.,* 288 NLRB 956 (1977). However, when there is no evidence that an individual possesses any one of the several primary indicia for statutory supervisory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J. C. Brock Corp.,* 314 NLRB 157 (1994), and *St. Alphonsus Hospital*, 251 NLRB 620 (1982).

In *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571 (1994), the Supreme Court set forth the test for determining whether an individual is to be deemed a supervisor.

The Court noted that in making a determination on the question of one's supervisory status.

> [T]he statute requires the resolution of three questions and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities [in section 2(11)]? Second, does the exercise of that authority require "the use of independent judgment?" Third, does the employee hold authority "in the interest of the employer?"

511 U.S. at 573–574.

Moreover, it is well settled that the job title "supervisor," in and of itself, is an insufficient basis to qualify an individual as a supervisor within the meaning of Section 2(11) of the Act. Rather, it must be established that an individual exercises independent judgment in one or more of the powers enumerated in Section 2(11) of the Act. Accordingly, the exercise of supervisory judgment in a merely routine, clerical, perfunctory, or sporadic manner does not make an employee a supervisor as envisioned by the act, the test of which must be the significance of the judgment and directions. *Lakeview Health Center,* 308 NLRB 75 (1992).

As indicated above the burden of proving that an individual is a supervisor rests squarely on the party asserting that such

status exists. *Pine Brooks Care Center*, 322 NLRB 740 (1996); *Tucson Gas & Electric Co.,* 241 NLRB 181 (1979); and *Ohio Masonic Home*, 295 NLRB 390 (1989). Whenever there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria.

Based on the totality of the evidence, it is clear that the Respondent has failed to show that Hardman exercised independent judgment with regard to any of the factors establishing supervisory status under Section 2(11) of the Act, nor possessed any of the indicia of supervisory authority. Hardman testified without contradiction that he was without authority to hire, fire, or effectively recommend the hiring or firing of employees nor issue written warnings. The evidence further shows that while Hardman may have had greater job responsibilities and been responsible for assigning work to the cleaning crew and new hires, and may have directed their work these were in the nature of minor instructions or orders since he exercised no real authority over the employees and did not tell them what to do. *NLRB v. Wilson-Crissman Cadillac, Inc.,* supra; and *Federal Compress Warehouse Co. v. NLRB*, supra. Although his title was foreman he cleaned floors as did the other cleaning employees. Any problem with employees work which he could not resolve he would advise management for action. Hardman could order supplies but only with Ferronato's agreement. He could not grant overtime, vacation or allow employees to leave early without the approval of management and although Hardman testified that they might listen to his recommendation regarding an employee leaving early, this never happened. Ferronato, who testified at length, never contradicted Hardman's testimony nor did he indicate that Hardman had any indicia of supervisory authority.

From the above I find and conclude that the Respondent has failed to carry its burden of establishing that Hardman is a supervisor within the meaning of Section 2(11) of the Act. *Pine Brooks Care Center*, supra.

The amended complaint also alleges that sometime in late February 1996, the Respondent, by Dino Tomassetti, stated to employees that they had lost their jobs because they went on strike, and that Rocco Tomassetti stated to employees that the Respondent would not rehire any employee who had engaged in the strike, this conduct being in violation of Section 8(a)(1) of the Act.

According to the credited testimony of Upadye, when he asked Rocco Tomassetti for his job back in February, he was told that no strikers would be rehired. Similarly, Hardman testified credibly that when he requested his job back in July, Dino Tomassetti said that he lost his job because he went out on strike. These responses by Rocco and Dino Tomassetti that the Respondent does not have to take back strikers constitute unlawful threats of job loss. Such statements imply that strikers have no reinstatement rights and is inconsistent with employees' rights under *Laidlaw Corp*., 171 NLRB 1306 (1968), enfd. 414 F.2d 99 (7th Cir. 1967), cert. denied 397 U.S. 920 (1970).[19] and *Emerson Electric Co*., 287 NLRB 1065 (1988).

Accordingly, I find that the Respondent by these actions violated Section 8(a)(1) of the Act.

[19] *Laidlaw* guarantees permanently replaced economic strikers who have made unconditional offers to return to work the right to full reinstatement when positions are available, and to be placed on a preferential hiring list if positions are not available.

## IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

## V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged striking employees Najmal Upadye, Gary Francis, Will Hardman, Lucy Restrepo, Luis Acevedo, Cecilia Castano, Maria Serrano, and Richard Finnerty on February 5, 1996, the Respondent shall be ordered to offer them immediate reinstatement to their former positions, discharging if necessary any replacements hired since their terminations, and that they be made whole for any loss of earnings or other benefits by reason of the discrimination against them in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1980), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962).

The Board has held that unlawfully discharged strikers like unlawfully discharged employees, need not request reinstatement in order to activate the employer's backpay obligation. *Super Glass Corp. & Glassware*, 314 NLRB 596 (1994); and *Abilities & Goodwill, Inc*., supra. Thus, the discharged strikers are entitled to reinstatement and backpay from the date of the Employer's unlawful action, February 5, 1996, until the date he or she is offered reinstatement. *Super Glass Corp*., supra; *Cargilll Poultry Co*., supra; and *Abilities & Goodwill, Inc*., supra.

Regarding the Respondent's backpay obligations to Finnerty and Francis, it would appear that the Respondent contends that Finnerty was "retiring or had retired" and that .Francis had obtained equivalent employment and therefore these striking employees were due no backpay.[20] The question of just how much in backpay and interest is owed to them if anything by

[20] Finnerty testified that he was going to retire and collect social security but that he intended to work through May since the law allowed him to collect social security and still earn up to $11,000. The General Counsel contends that Finnerty should be awarded payments up to $11,000 per year until such time as the Respondent offers him reinstatement.

With regard to Francis, he currently holds a union position as a concierge earning something over $13/hour. He commenced that job around August as a temporary employee and became a permanent employee approximately 3 months later. At no time has he made as much money as he did while working for the Respondent when he earned over $14/hour. The General Counsel maintains that since Francis never earned what he did when working for the Respondent and there is no evidence that he abandoned interest in his job, he should be treated exactly the same as all the other strikers. I agree.

Although Francis currently has a union job, he is working at an apartment building and the contract covering apartment buildings mandates lower wages than the contract covering office buildings such as the Respondent's facility.

the Respondent is best left for determination in the supplemental or compliance stage of these proceedings. The same would be true of Hardman's alleged retirement and of Upadye's alleged equivalent employment.

Because of the nature of the unfair labor practices found here, and in order to make affective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

## CONCLUSIONS OF LAW

1. The Respondent, Dino and Sons Realty Corporation, is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 32B-32J, SEIU, is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees in February and again on July 11, 1996, that they had lost their jobs because they went out on strike and would not be rehired the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully discharging and refusing to reinstate striking employees the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

## ORDER

The Respondent, Dino and Sons Realty Corporation, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they have lost their jobs because they went out on strike and would not be rehired.

(b) Discharging and refusing to reinstate striking employees because they engaged in protected strike activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Najmal Upadye, Gary Francis, Will Hardman, Lucy Restrepo, Luis Acevedo, Cecilia Castano, Maria Serrano, and Richard Finnerty full reinstatement to their former positions or, if their jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Upadye, Francis, Hardman, Restrepo, Acevedo, Castano, Serrano, and Finnerty whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent had gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 1996.[23]

(f) Within 14 days after the service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that they have lost their jobs because they went out on strike and would not be rehired.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[23] *Excel Container, Inc*., 325 NLRB 1 (1997).

WE WILL NOT discharge and refuse to reinstate employees because they engaged in protected strike activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer Najmal Upadye, Gary Francis, Will Hardman, Lucy Restrepo, Luis Acevedo, Cecilia Castano, Maria Serrano, and Richard Finnerty full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Upadye, Francis, Hardman, Restrepo, Acevedo, Castano, Serrano, and Finnerty whole for any loss of earnings and other benefits resulting from their unlawful discharges, less interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Upadye, Francis, Hardman, Restrepo, Acevedo, Castano, Serrano, and Finnerty, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

DINO AND SONS REALTY CORPORATION